

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

GRAND JURY

No. 10000

ALFRED PALMER, BY AL. PLANTING IN

THE STATE OF OHIO

IN FAVOR OF THE UNITED STATES

(26,121)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 654.

ALBERT PALMER ET AL., PLAINTIFFS IN ERROR,

vs.

THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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1 Supreme Court of the State of Ohio.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Ohio, in the City of Columbus, this 24th day of August, A. D. 1917.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

2 The Supreme Court of Ohio.

No. 15532.

ALBERT PALMER et al.

vs.

THE STATE OF OHIO.

Petition for Writ of Error. Assignment of Error. Order Allowing Writ of Error.

The petition of Albert Palmer et al., by I. F. Raudabaugh and John G. Romer, attorneys, hereby sets forth that on or about the third day of July, A. D. 1917, the Supreme Court of the state of Ohio made and entered a final order and judgment herein in favor of the State of Ohio, and against the said Albert Palmer et al., in which final order and judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of Albert Palmer et al., all of which will more in detail appear from the assignment of errors which are set out in this petition.

That the said Supreme Court of the state of Ohio is the highest court of the said state of Ohio in which a decision in this suit and in this matter could be had.

Petitioners show that a Federal question was made in said case, and that said judgement of said Supreme Court was repugnant to and in conflict with the laws, of the United States, and that a decision of said Federal questions was necessary to the judgement rendered, and makes herewith the following assignment of errors to wit:

First. Because said judgement and finding of said court is against

3 and contrary to the law of the land in this: That said motion to quash the service therein made upon the Governor and Attorney General of the State of Ohio should have been overruled, whereas said motion was sustained.

Second. Because said ruling is repugnant to the 14th Amendment of the Constitution of the United States, especially the provision therein that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Third. That said judgment and ruling of said court is in conflict with Article 5 of the Constitution of the United States, especially that provision therein which states "Nor shall private property be taken for public use, without compensation."

Fourth. Because the people of the State of Ohio by popular vote in pursuance of a submission thereof by their Constitutional Convention, legally and publically did consent and declare for the right of the citizen of the state to sue the state to recover his rights so as aforesaid herein set out in said Article 5 and the 14th Amendment of and to the Constitution of the United States. That the courts of Ohio have so found that: "It must be conceded that such consent was given by the amended Section 16 of Article 1 of the Constitution (of Ohio) adopted September 3rd, 1912, which provides that: "Suits may be brought against the state, in such courts, and in such manner, as may be provided by law." And the said courts in conjunction therewith also find that plaintiffs have no other remedy for protecting their property by due process of law.

4 Fifth. The court erred in reading this clause of said Constitution as if standing alone, when it should have read it with the whole of Section 16 Article 1 of said Ohio Constitution as amended and in accordance with said Article 5 and the 14th Amendment of the Constitution of the United States.

Sixth. The *greviances* complained of came about through the impairment of a contract between the United States and the State of Ohio.

Wherefore your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and that the errors aforesaid complained of and other errors appearing in the record, may be examined and corrected and said judgement reversed, and that a transcript of record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 24th day of July, A. D. 1917.

ALBERT PALMER ET AL.,
By I. F. RAUDABAUGH,
JOHN G. ROMER,
Attorneys and Counsel for Petitioners.

5 *Order Allowing Writ of Error to the Supreme Court of the
United States.*

In the Supreme Court of Ohio.

ALBERT PALMER et al.

v.

THE STATE OF OHIO.

This matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of Ohio, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter. It is ordered that the writ of error as prayed for be and is hereby allowed this 24th day of July, A. D. 1917.

Bond to be given in sum of one hundred dollars.

HUGH L. NICHOLS,

Chief Justice, Supreme Court of the State of Ohio.

Filed in my office this 7th day of August, A. D. 1917.

FRANK E. McKEAN,

Clerk of the Supreme Court of Ohio.

6 [Endorsed:] No. 15532. Supreme Court of Ohio. Albert Palmer et al. vs. The State of Ohio. Petition for Writ of Error, Assignment of Errors and Prayer for Reversal. Filed Aug. 7, 1917. Supreme Court of Ohio. Frank McKean, Clerk.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the state of Ohio before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Albert Palmer et al., and The State of Ohio wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute

8 of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Albert Palmer et al., as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23 day of August, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States District Court, Southern Dis. Ohio.]

B. E. DILLEY,
*Clerk of the District Court of the United
 States, Southern District of Ohio.*

Allowed by

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

9 [Endorsed:] Supreme Court of the United States, October Term, 191—. — vs. ——. Writ of Error. Filed Aug. 23, 1917, Supreme Court of Ohio. Frank E. McKean, Clerk.

10 (Original.)

UNITED STATES OF AMERICA, ss:

To the State of Ohio, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Ohio, wherein Albert Palmer et al., — plaintiff- in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Hugh L. Nichols, Chief Justice of the Supreme Court of Ohio, this 22d day of August, in the year of our Lord one thousand nine hundred and seventeen.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

11 On this 24th day of August, in the year of our Lord one thousand nine hundred and seventeen, personally appeared before me, the subscriber, Philip Allen, Deputy Marshal Ohio Supreme Court and makes oath that he delivered a true copy of the within citation to Hon. Joseph McGhee, Attorney General of the State of Ohio.

PHILIP ALLEN,
Deputy Marshal Ohio Supreme Court.

Sworn to and subscribed the 24th day of August, A. D. 1917.

FRANK E. McKEAN,
Clerk Ohio Supreme Court.

Filed Aug. 23, 1917, Supreme Court of Ohio. Frank E. McKean, Clerk.

12 *Precipe.*

In the Supreme Court of Ohio.

ALBERT PALMER et al., Plaintiffs in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

Hon. F. E. McKean, Clerk:

Make, certify and transmit to the Supreme Court of the United States, the entire record in this case, including all pleadings, entries, motions, docket entries, and certificates.

Dated August 22nd, 1917.

I. F. RAUDABAUGH,
JOHN G. ROMER,
Attys. for Plaintiff in Error.

[Endorsed:] 15532. Palmer et al., vs. The State of Ohio. Precipe. Filed Aug. 21, 1917, Supreme Court of Ohio. Frank E. McKean, Clerk.

13 (Copy.)

Know all men by these presents, That we, Albert Palmer, as principal, and D. Hellwarth and J. H. Pulskamp, as sureties, are held and firmly bound unto The State of Ohio in the full and just sum of One Hundred dollars, to be paid to the said obligee to which payment, well and truly to be made, we bind ourselves, our

heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of July, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a Supreme Court of the State of Ohio in a suit depending in said Court, between Albert Palmer et al., Plaintiffs in Error and The State of Ohio, Defendant in Error, a judgment was rendered against the said Albert Palmer et al., and the said Albert Palmer et al., having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The State of Ohio citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Albert Palmer et al., shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

ALBERT PALMER. [SEAL.]
D. HELLWARTH. [SEAL.]
J. H. PULSKAMP. [SEAL.]

Sealed and delivered in presence of

I. F. RAUDABAUGH.
JOHN G. ROMER.

Approved by

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

Supreme Court of the State of Ohio, January Term, A. D. 1917.

No. 15532.

Attorneys.	Title of case.	Action.	Fees & costs.	Paid by—
I. F. Raudabaugh, John C. Romer, S. S. Scranton, Celina;	Albert Palmer, et al. v. The State of Ohio.	Error to the Court of Appeals of Mercer County. Motion for an order directing the Court of Appeals of Mer- cer County to cer- tify its record.	Petition \$5.00 Motion 2.00 Transcript United States Supreme Court \$5.00	John G. Romer John G. Romer John G. Romer
Joseph McGhee, Attorney Genl., John F. Kramer, Columbus.				

(TRANSCRIPT OF DOCKET ENTRIES.)

Memoranda of Pleadings, etc., Filed, Writs Issued, etc., Judgments, Orders and Decrees.

Date.

1917.

- Feb'y. 27th. Petition in error, court of appeals transcript and original papers filed.
- " " Motion for an order directing the court of appeals to certify its record, filed.
- " " Court of Appeals transcript and finding of Court of Appeals mailed to John G. Romer, Celina, March 3, 1917 returned.
- Mch. 3rd. Court of Appeals transcript re-filed.
- " 7th. Plaintiff's briefs on motion filed in No. 15531.
- " " Papers taken by Mr. Kramer.
- " 8th. Plaintiff's briefs on merits filed in No. 15531.
- " 9th. Precipe for summons filed, and summons issued for defendant to Sheriff of Franklin County, returnable March 19, 1917 (service to be made on Attorney General and Governor) (Sent by Messenger—Sheriff's receipt filed.)
- " 17th. Summons returned and filed, endorsed: "Sheriff's return. State of Ohio, Franklin County, ss: Received this writ March 10, A. D. 1917, and pursuant to its command on March 12, 1917, I served the same by personally handing a true and duly certified copy of this writ with all the endorsements thereon, to each of the following within named defendants, James M. Cox, Governor of the State of Ohio, and Joseph McGhee, Attorney General of the State of Ohio. Fees \$1.46. William M. Slack, Sheriff of Franklin County, Ohio, by John Trautman, Deputy."
- " 20th. Motion for an order directing the Court of Appeals of Mercer County, to certify its record, and printing of record and briefs dispensed with.
Journal No. 27, page 432.
- " 26th. Order No. 142 issued to Clerk of Court of Appeals of Mercer County to certify record. Chief Justice said case to be heard on original petition and certification.
- May 17th. Defendant's printed briefs filed. June 4, 1917, proof of service filed.
- June 4th. Two additional copies of plaintiff's briefs filed.
- " 15th. Plaintiff's typewritten reply brief filed.
- July 3rd. Judgment of Court of Appeals affirmed. Per curiam.
Journal No. 27, page 510.

15 (No. 15532.)

1917.

- July 10th. Mandate issued.
 " " Original papers sent to Clerk.
 Aug. 7th. Petition for writ of error and order allowing Writ,
 (allowed by Hugh L. Nichols, Chief Justice), as-
 signment of errors and prayer for reversal, filed.
 " 21st. Bond for \$100.00, signed by Albert Palmer, D.
 Hellworth and I. F. Raudabaugh, filed.
 " " Precipe for record and docket entries, filed.
 " " Writ of error filed; citation to defendant in error filed.
 " " Two copies of Writ of Error deposited in files.
 " " Original Bond deposited in files.
 " 24th. Return of Citation entered.

16 No. 15532.

ALBERT PALMER et al.

v.

THE STATE OF OHIO.

Journal Entries.

1917.

- March 20th. It is ordered by the court that this motion be, and
 the same hereby is, allowed. It is further ordered,
 for good cause shown, that the printing of record
 and briefs herein be dispensed with.

Journal No. 27, page 432.

- July 3rd. This cause came on to be heard upon the transcript
 of the record of the Court of Appeals of Mercer
 County, and was argued by counsel. On considera-
 tion whereof, it is ordered and adjudged by this
 court, that the judgment of the said court of ap-
 peals be, and the same hereby is, affirmed; and
 it appearing to the court that there were reason-
 able grounds for this proceeding in error, it is
 ordered that no penalty be assessed herein. It
 is further ordered that the defendant in error re-
 cover from the plaintiff in error its costs herein
 expended, taxed at \$—. Ordered, that a special
 mandate be sent to the Common Pleas Court of
 Mercer County, to carry this judgment into execu-
 tion. Ordered, that a copy of this entry be certified
 to the Clerk of the Court of Appeals of Mercer
 County, "for entry."

Journal No. 27, page 509.

July 23rd. This matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of Ohio, and upon examination of said petition and the record in said matter, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that the writ of error as prayed for be, and is hereby, allowed this 24th day of July, A. D. 1917. Bond to be given in sum of one hundred dollars.

HUGH L. NICHOLS,
*Chief Justice, Supreme Court
 of the State of Ohio.*

Filed in my office this 7th day of August, A. D. 1917.

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

Journal No. 27, page 520.

17 Supreme Court of the State of Ohio.

Certificate of Lodgment.

STATE OF OHIO,

City of Columbus, ss:

I, Frank E. McKean, Clerk of said Court, do hereby certify that there was lodged with me as said Clerk on Aug. 21st, 1917, *1917*, in the case of Albert Palmer et al., plaintiff in error, against The State of Ohio, defendant in error,—

1. The original bond, a copy of which is herein set forth.
2. Two copies of the writ of error as herein set forth, one for the defendant in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Columbus, Ohio, this 23rd day of August, 1917.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

18 STATE OF OHIO,
 Mercer County, ss:

Court of Common Pleas.

ALBERT PALMER et al., Plaintiffs,

vs.

THE STATE OF OHIO, Defendant.

Petition.

Plaintiff for himself those for whom he brings this suit, for his first cause of action says:

That he is one of the claimants for himself and the several claimants herein, who have claims against the State of Ohio for damages done to said claimants by said the State of Ohio, overflowing said claimants' lands, herein described, during July and August, A. D. 1912.

That as such claimant and as plaintiff he has been authorized and directed to bring this suit and hereby does so sue for himself and all those herein named as claimants, as each and severally having the same cause of action, and this suit is brought to avoid a multiplicity of suits in and upon the same cause of action.

Plaintiff further avers that he has been authorized by the constitution of the State of Ohio, since September 3rd, 1912, under the then adopted amendment to said constitution to so bring this his said suit.

That it was the intention, will and understanding of the people, adopting said amendment so to authorize such a suit to be brought. Plaintiff alleges this as a material fact, which he stands ready to prove.

Plaintiff for himself and those for whom he sues, claims damages from the State of Ohio for and on account of the negligently overflowing said claimants' lands, as will be more fully herein set out.

19 Said damages arose by reason of the following acts of the said State of Ohio:

The said State has, and for many years has had the proprietary ownership over a large reservoir in Town 6 S. Ranges 2, 3 & 4 East in Mercer and Auglaize Counties, Ohio, and does still so maintain said reservoir, and which reservoir contains some 15,500 acres in area.

This reservoir was constructed for the purpose of storing water for supplying the Miami and Erie Canal as a water way for navigation and for no other purpose.

This reservoir was built as part of this canal system, by erecting great embankments, one across Beaver Creek on the West and one across Chickasaw Creek on the East, behind which embankments a store of some 10 feet in depth of water was maintained for supplying said canal. That said canal was on the East of said reservoir. That

originally, before the erection of said embankments, the waters therein flowed from near the center thereof, both East and West.

That the Congress of the United States granted to the State of Ohio large quantities of land for the purpose of constructing said canal for navigation and from the proceeds of the sale of said lands the said State did construct said canal as a water way for navigation.

The only consideration ever received for the said lands so granted was that the State of Ohio should from the said proceeds of the sale thereof construct and maintain a water way that might be used by the United States for the transportation of Federal commodities, free from and toll of other charges whatever.

In the construction of said reservoir sundry streams were banked off and turned into said reservoir that would not otherwise have flowed thereinto.

20 That at the place where said embankment crosses the main outlet on said Beaver Creek it is about one hundred feet wide at the base and of the height of twenty feet.

When said reservoir was first constructed, waste weirs were established at the North East and North West corners of said reservoir.

It was and is of the length of nine miles and these waste weirs were nine miles apart. The mitre sill or bottom of said weirs were built to elevation of the then established lines around said reservoir. These lines were fixed by an act of the legislature of Ohio in the year 1843, and known as the Conover line. They were to be contour line around said reservoir on the same plane with said waste weirs.

Said reservoir as a part of said canal system was continuously in the hands of canal commissioners, Boards of Public Works and Superintendents of said State from the time of their construction.

Said reservoir was constructed during the years from 1837 to 1841; in which last year the water was permanently shut into said reservoir.

No act of the legislature has ever authorized the establishment of any other line than the said Conover line.

Yet the Board of Public Works did about the year 1856 create other weirs, and afterwards had lines established at an elevation five feet lower than the said original waste weirs and said Conover line, thereby rescuing from said reservoir large areas of land which they proceeded to sell.

They began to establish these lines in 1876, and continued to so define and establish them to and including the year 1903.

Said canal and reservoir were used for navigation from said year 1841 to about the year 1890. During all this time large
21 quantities of water were flowed to the East through a canal feeder into said canal for the maintenance of said canal for navigation. That by consequence of depressing the elevation of said reservoir the Board of Public Works constructed a waste weir at the South-west corner thereof and also one at the North-west corner at an elevation of five feet lower than the first waste weirs. On the one at the North-west corner the said Board of Public Works acquired two mill sites, and thereon executed leases for water power for two grist mills. They also constructed a waste weir near the South-east corner thereof.

All these waste weirs constituted means of egress for the waters as they accumulated in said reservoir.

The said Beaver Creek furnished the only outlet for all the waters that flowed through said waste weirs at the Southwest and Northwest corners of said reservoir.

This Beaver Creek was and is a stream of very low gradient and water therealong is sluggish of flow.

There was a wide area of waste and swamp land therealong, and water stood over these lands and stagnated so that all the country in its vicinity was afflicted with malaria and all human kind shook with chills and burned with fevers.

About the year 1878 the people in that locality took steps to redeem this swamp and render it habitable and so gather the waters into a channel. This they accomplished at great expense and labor in constructing a main channel, side ditches, building roads and levees, whereby this said swamp land was made to bloom as a garden and all vicinity was rendered healthful. To this end the people therealong have dredged said stream the third time and the land therealong has been thereby rendered very productive and very valuable.

In the year 1886 the said Board of Public Works closed up the waste weir at the Northwest corner of said reservoir then being used by the two grist mills as aforesaid and resumed the water therefrom on the claim that they needed it for navigation. The waste at the Southwest corner was also closed up. The said canal fell into decay and has not been used as such water way for about twenty years.

The only egress for water from said reservoir was thereby limited to the one waste weir at the Southwest corner thereof. This waste weir was located at the mouth of Coldwater Creek which stream with others had been turned into said reservoir as aforesaid by throwing an embankment across the channel thereof, so as to turn them into said reservoir. This waste weir was five feet lower, as aforesaid, than the original waste weirs and it was located one and one half miles south from said Beaver Creek outlet and at right angles thereto and some fourteen feet above the elevation of said Beaver Creek.

The State as aforesaid had shut up all other avenues of escape for said the accumulated waters from said reservoir. Then at flood times and whenever heavy rains came these waters were poured down said Coldwater Creek and together with the flood tide in the reservoir, by reason of there being no outlet, flooded over, through and above high water marks and lines down onto said the lands along said Beaver Creek. That said waste weir was of the width of ninety feet.

That when the water- as aforesaid, had been so held up till they came over said waste weir, they were thrown out to said reservoir at right angles to said Beaver Creek outlet and carried down along said embankment through weeds, brush and over a wide expanse of dug over land till it was thrown over the low bottoms of said Beaver Creek there to seek its way slowly into and over said ditch and channel of said creek to again take up its course Westward.

By so accumulating said waters in said reservoir, and so forcing

them to a single point of egress, and thus flowing them in the manner set out they flooded all said lands that had been so redeemed by the people along Beaver Creek, thereby again returning them to their original state and destroying vast areas of fertile fields, causing the crops thereon to rot and fester in the sun and again rendering the country therealong unfit for habitation for the time that they would so flood said lands. Thereby they also filled up and destroyed the ditch that the people had so constructed at so great an expense.

With full knowledge of all these conditions, so brought about by the said the officers and agents of the State in charge of said reservoir they the said the Board of Public Works having charge thereof and thereover did enter into a contract to furnish water power to the Auglaize Power Company of Defiance, Ohio, a corporation company located some sixty miles from said reservoir and by and under the provisions of said contract were yet to flow the waters of another reservoir, to wit: the Lorainic reservoir into and upon the said Mercer County reservoir. That said Board were undertaking thereby to furnish many thousands of horse power by storing the water in said reservoir. To this end the said Board of Public Works during the spring and summer of 1912 held the water to a high and dangerous stage in said Mercer County reservoir.

The defendant, the State of Ohio, had full knowledge of the danger of doing the lands along said Beaver Creek great damage in manner and form above set out. They had paid damages for such destruction of crops by reason of the overflowing of said lands from said reservoir through said waste weir some three times, and were fully notified by the plaintiffs of the certainty of such destruction unless they provided for lower stages of water and more efficient management thereof. At the same time all egress for water to the East, where it had been taken for navigation, and where it had flown before the construction of said public works as aforesaid, had been completely shut off except a 30 inch tile put in, in 1910 or 1911.

So the officers of the State having charge of the Public Works had taken every means to bring about the flooding and destruction of plaintiff's said land. That said claimant Albert Palmer owns

the following described land located along the outflow of said the waters from said reservoir through said waste weir and along said Beaver Creek being All in Mercer County, Ohio.

Now as aforesaid, while the said the agents of the State of Ohio had fixed great barriers, namely, the West embankment of said reservoir and then through this barrier as well as through the Eastern barrier had closed up all ways of egress for the water stored behind said barriers but the one situated as aforesaid, they had also fixed certain elevations to which they had proclaimed they would not let the water in said reservoir exceed and flow over, yet during the summer and spring of 1912 in disregard of the protests of these plaintiffs, and in disregard of the frequent notices to them given, they held the water in said reservoir to such a high stage that from the 18th day of July, 1912, to the middle of August 1912, it was from two to

three feet higher than the high water elevation so fixed by themselves.

That the said water during this time flowed some two feet over the top of the high water line as so fixed in about the year 1856, and surveyed and established in 1876, and three feet higher than the one fixed in 1903, and was thereby forced and propelled down over plaintiff's lands through and over the top of said waste weir.

That thereby they flooded said lands of plaintiff as above described and destroyed and rotted his crops upon the ground, rendered his lands a rotten bog, thereby creating foul odors and noisome smells, washing gullies in places, and so drowned out and destroyed plaintiff's crops.

25 The said Albert Palmer lost crops on his said land described to the value of \$607.00.

Plaintiff further says that the said Board of Public Works were then and at that time holding and storing said waters behind said barriers for hydraulic purposes only, with the view of gaining revenue therefrom, that the said canal had long before been completely abandoned for navigation and that such storage was illegal and unauthorized by law. That said damages arose from the wanton neglect of the said Board of Public Works of the State of Ohio.

Plaintiffs own said his lands herein described in fee simple, which the said the agents of the defendant well knew. Yet the defendant without procuring any right therefor did from the 18th day of July 1912 to the middle of August 1912 invade, occupy and use the same and without any authority so to do did flow said water from said reservoir over and upon said lands of plaintiffs and each and every one of them to his and their great damage in the sum of \$24,953.00 for which these claimants and each of them pray for judgement.

I. F. RAUDABAUGH,
JOHN G. ROMER,

Attys. for Plaintiffs.

(Verification.)

Precipe.

To the Clerk:

Please issue summons in above entitled action directed to the Governor of Ohio, indorsed "Suit against the State, Damages claimed \$24,953.00."

I. F. RAUDABAUGH AND
JOHN G. ROMER,

Attorneys for Plaintiffs.

Summons duly served on the Governor and Attorney General of the State of Ohio, on which the following return was made.

"STATE OF OHIO,
Franklin County, ss:

Received this writ February 9th, 1915 at 9 o'clock A. M., and pursuant to its command I did on the 9th day of February, 1915 serve

the within Frank B. Willis, Governor of Ohio by personally handing him a true and duly certified copy of this writ with all indorsements thereon.

CHARLES L. RESCH,
Sheriff of Franklin County, Ohio."

Also summons served on the Attorney General of Ohio with same indorsements.

26

Motion.

"STATE OF OHIO,
Mercer County, ss:

In the Court of Common Pleas.

ALBERT PALMER, for Himself and Others, Plaintiff,

vs.

THE STATE OF OHIO, Defendant.

Motion to Quash Service by the State of Ohio.

Comes now the State of Ohio, solely for the purpose of this motion, and not intending in any manner to enter its appearance herein, and at all time objecting to the jurisdiction of the Court over it,—that the summons issued herein for the State of Ohio be set aside and held for naught; and that the service and return of said summons be set aside and held for naught for the reason that the issue and service of summons and process against the State of Ohio is not authorized by law. And for the further reason that the summons issued in this cause was served at Columbus in Franklin County, Ohio, without the jurisdiction of the court and such pretended service of summons conferred upon the court no jurisdiction whatever of the person of the defendant.

EDWARD C. TURNER,
Attorney General.

C. R. BELL, *Of Counsel.*"

27

Journal Entry.

THE STATE OF OHIO,
Mercer County, ss:

In the Court of Common Pleas.

ALBERT PALMER et al., Plaintiffs,

vs.

THE STATE OF OHIO, Defendant.

Journal Entry.

This day this cause came on to be heard upon the motion to quash the service in above entitled action, and upon the arguments and

briefs of counsel for plaintiff and defendant, and the court being fully advised in the matter do sustain said motion and dismiss said petition of said plaintiff at their costs to which ruling and order of said court the plaintiff excepts and gives notice of his intention to prosecute error herein.

28

Petition in Error.

STATE OF OHIO,

Mercer County, ss:

In the Court of Appeals.

ALBERT PALMER et al., Plaintiffs,

vs.

THE STATE OF OHIO, Defendant.

Petition in Error.

The Plaintiffs in error claim that there is manifest error prejudicial to them in the record and proceedings of the Common Pleas court of said county filed herewith and made a part hereof in this:

That the said Court sustained the said motion to quash the service and dismiss the petition of the plaintiff when by the law of the land said motion should have been overruled.

That said Court erred in holding that under the present Constitution of Ohio that the said state is immune to suit against said state without the intervention of the legislature further providing therefor, and there are other errors prejudicial to the plaintiff in error manifest upon the face of the record.

I. F. RAUDABAUGH,

JOHN G. ROMER,

For Plaintiffs in Error.

29

Entry.

COURT OF APPEALS,

Mercer County, Ohio:

Number 347.

ALBERT PALMER et al., Plaintiffs in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

To Clerk:

In the above entitled action enter the following minutes on the trial docket, as of date January 25th, 1917, and at once inform all attorneys of record in said action to wit: Judgement affirmed at costs

of plaintiffs in error, on the reasoning in the opinion of Judge Bowman. Remanded for execution. Exceptions saved.

PHIL. M. CROW,
W. H. KINDER,
KENT W. HUGHES,
Judges.

30

Petition in Error.

In the Supreme Court of Ohio.

ALBERT PALMER et al., Plaintiffs,

vs.

THE STATE OF OHIO, Defendants.

Petition in Error.

Now comes the plaintiff- in error who are the plaintiffs below and say, that there is manifest error prejudicial to them in the records and proceedings of the Court of Appeals in and for Mercer County, Ohio, filed herewith and made a part hereof in this to wit:

That at the term of court held on the 25th day of January, 1917, said plaintiff- in error had filed with said Court of Appeals their petition and proceedings as required by law under Section 16 of Article One of the Constitution of the State of Ohio as amended on the third day of September, 1912, against the State of Ohio.

That the defendant, the State of Ohio filed with said court a motion to quash the service theretofore made upon the Governor and Attorney General of the State of Ohio and which motion was by said Court of Appeals sustained and said petition dismissed and judgement for costs rendered against these plaintiffs, when it should have been rendered against the defendant by the law of the land.

That said Section of the Constitution as amended on the 3rd day of September 1912, reads: "All courts shall be open, and every person for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay. Suits may be brought against the State in such courts and in such manner as may be provided by law."

31 That up to the 3rd day of September, 1912, said section read as follows:

"All courts shall be open, and every person for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law; and justice administered without denial or delay."

And said court disregarding the said amendment construed the aforesaid section of the amended constitution just as it had been construed before the adoption of aforesaid amendment to the great injury of these plaintiffs in error and other errors are made manifest upon the face of the record.

Wherefore plaintiffs in error pray that said judgement and proceedings be reversed, with costs, and that they may be restored to all things that they have lost by reason thereof.

I. F. RAUDABAUGH AND
JOHN G. ROMER,
Attorneys for Plaintiffs in Error.

32 THE STATE OF OHIO,
Mercer County, ss:

I, J. B. Haslinger, Clerk of the Court of Common Pleas and Court of Appeals within and for said county, and in whose custody the Files, Journals and Records of said Courts are required by the laws of the State of Ohio to be kept, hereby certify that the within Petition in the Common Pleas Court, the Precipe, for summons on the Governor and Attorney General of Ohio, The Motion to Quash, and the Journal Entry in the Common Pleas Court, and also the Petition in Error in the Court of Appeals, The Entry thereon are true copies of the original now on file in said Clerk's office in the case of Albert Palmer et al., Plaintiffs, vs. The State of Ohio, Defendant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said courts, at Celina, Ohio, this 15 day of August, A. D. 1917.

[Seal Common Pleas Court, Mercer County, Ohio.]

J. B. HASLINGER,
Clerk of Courts.

33 *Certified Copy of Opinion.*

34 PALMER et al.

v.

THE STATE OF OHIO.

RAUDABAUGH

v.

THE STATE OF OHIO.

1. A state is not subject to suit in its own courts without its express consent.
2. The provision of the Ohio Constitution, Article I, Section 16, as amended September 3, 1912, that "Suits may be brought against the state, in such courts and in such manner, as may be provided by law," is not self-executing; and statutory authority is required *is* a prerequisite to the bringing of suits against the state.

(Nos. 15532 and 15531—Decided July 3, 1917.)

Error to the Court of Appeals of Mercer County.

In the court of common pleas of Mercer county the plaintiffs, I. F. Raudabaugh, Albert Palmer and others, filed their actions for damages against the State of Ohio, alleging that the state, through its public officers, so negligently constructed and maintained the Mercer County Reservoir as to cause the lands of the plaintiffs to be flooded.

The state, through its attorney general, moved to quash the service against the state, for the reason that process against the state was not authorized by law. The common pleas court sustained the motion to quash, and dismissed the petitions. This judgment was
35 affirmed by the court of appeals, and error is now prosecuted to this court.

Mr. I. F. Raudabaugh, Mr. John G. Romer and Mr. S. S. Scranton, for plaintiffs in error.

Mr. Joseph McGhee, attorney general, and Mr. John F. Kramer, for defendant in error.

JONES, J.:

Section 16, Article I, of the State Constitution, as amended September 3, 1912, is as follows: "All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. *Suits may be brought against the state, in such courts and in such manner, as may be provided by law.*" The italicized portion of this section was the amendment thereto adopted on September 3, 1912. No legislative action has been taken authorizing suits against the state in pursuance of that amendment.

It is now contended by counsel for plaintiffs in error that, until legislative action is taken prescribing the courts and manner in which suits may be brought, the state is amenable to suit; that the right to sue the state becomes operative immediately and is not in abeyance, awaiting legislative consent.

It is a fundamental principle of law that the state, as a sovereign,
is not liable to be sued in its own courts without its express
36 consent. It is maintained, however, that the constitutional amendment above quoted has given that consent. Related provisions of the Wisconsin Constitution are as follows: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." Similar provisions are found in the Constitutions of Alabama, Arkansas, Kentucky and Washington, but in all of these states their several courts have held that under constitutional provisions of that character actions cannot be maintained against the state in its own courts unless such is au-

thorized by legislative action; that such provisions are not self-executing in character. *Turner v. State*, 27 Ark., 337; *Chicago, Milwaukee & St. Paul Ry. Co. v. State*, 53 Wis., 509; *Beers v. Arkansas*, 20 How., 527; *Ex parte Greene*, 29 Ala., 52; *Northwestern & Pacific Hypotheek Bank v. State*, 18 Wash., 73; *Title Guaranty & Surety Co. v. Guernsey*, 205 Fed. Rep., 94, and *Tate, Treas., v. Salmon*, 79 Ky., 540.

Some of these as well as other cases cited in the opinion are also authority for the principle that though legislative consent may have been authorized for the bringing of such suits, such consent may be later withdrawn by the legislature, even though liability accrued while the consenting statute was in force.

It is difficult to perceive any material difference between the provision of the present Ohio Constitution and those of the
37 state constitutions above named. If the Ohio provision had read "Suits may be brought against the state," without further qualification, there might be some reason for the contention made, but it is evident that there has been attached to the consent given a qualification and condition which authorizes such suits to be brought only in such courts, and in such manner as "may be provided by law," and until a statute has been enacted no such suit may be brought against the state.

Section 22, Article VI of the Nebraska Constitution is but very little different from our own. It provides that "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought." The Supreme Court of Nebraska held that this provision was not self-executing; that legislative action was necessary to make it available; and apparently made no distinction in that regard between the Nebraska Constitution and the constitutions of the various states heretofore noted. *State v. Mortensen*, 69 Neb., 376-386.

This provision of the Ohio Constitution, however, and the provisions of the California and Tennessee Constitutions are in *hæc verba*, which latter constitutions were adopted and in force and construed by their several courts long prior to the adoption of the Ohio amendment in 1912. And inasmuch as this state adopted the language of those earlier constitutions it may be presumed
38 that the constitutional convention at the time knew of the construction given them by their respective courts. The Constitutions of California, both that of 1849 and that of 1879, contained the following provision: "Article XX, Section 6. Suits may be brought against the State in such manner and in such courts as shall be directed by law." The courts of California held that under such provision, in the absence of an enabling statute, the state cannot be sued. They so held at times when each of above constitutions was in force in that state. (*People v. Talmage*, 6 Cal., 256; *People v. Miles*, 56 Cal., 401, and *Melvin v. State*, 121 Cal., 16.) A similar construction has also been given to this provision in the Constitution of California by a federal court, in *Galbes v. Girard et al.*, 46 Fed. Rep., 500, where it was held: "Const. Cal. Art. 20, Sec. 6, provides that 'suits may be brought against the state in such

manner and in such courts as shall be directed by law'; but, where no law has been passed by the state authorizing such suits, a motion to dismiss as to the state in a suit in which the state is a made a party defendant, must be sustained."

The related provisions of the Tennessee Constitutions adopted in 1834 and 1870 are similar to our own. Section 17, Article 1 of the Tennessee Bill of Rights, provides: "All courts shall be open; and every man, for an injury done in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may by law direct." Under this provision of the Tennessee Constitution the supreme court of that state holds in the syllabus in the case of General Oil Co. v. Crain, 117 Tenn. (9 Cates), 82: "The constitutional provision that suits may be brought against the State in such manner and in such courts as the legislature may by law direct is not self-executing." That provision of the Tennessee Constitution was also construed by the supreme court of the United States in *Railroad v. Tennessee*, 101 U. S., 337. In this case the statute had been passed by the state granting its consent to the bringing of the suit in question, and while such statute was in force the liability accrued. Before the suit was brought the consenting statute was repealed. Plaintiff was denied relief under the provisions of the Tennessee Constitution by both state and federal courts.

We, therefore, hold that the provision of the Ohio Constitution above noted is not self-executing, and that legislative authority by statute is required as a prerequisite to the bringing of an action against the state in its own courts.

In each case the judgments of the court of common pleas and the court of appeals are affirmed.

Judgments affirmed.

Nichols, C. J., Wanamaker, Newman, Matthias, Johnson and Donahue, JJ., concur.

40

Columbus, Ohio, August 24, 1917.

I do hereby certify the foregoing to be a true and correct copy of the original opinion of this court in the cases of *Palmer et al. v. The State of Ohio* and *Raudabaugh v. The State of Ohio*, as the same is on file in this office; but the same is subject to revision and addition by the judges, until published in the official reports.

E. O. RANDALL,
Reporter of the Supreme Court of Ohio.

41

Supreme Court of the State of Ohio.

No. 15532.

ALBERT PALMER et al., Plaintiffs in Error,

v.

THE STATE OF OHIO, Defendant in Error.

Authentication of Record.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, citation to defendant in error and return of service thereof, are the original papers filed in this Court in the above entitled cause; that the copy of the bond is a true copy of the bond filed in said cause; that a motion was filed by plaintiff in error in the Supreme Court of Ohio to dispense with printing the record in this case, and allowed on March 20, 1917, and the cause was heard without the filing of printed record; that the original pleadings in the Court of Appeals and Common Pleas Court have been certified to by the Clerk of Courts of Mercer County, all of which are submitted herewith; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said court; and that an opinion was rendered in said cause, copy of which is hereto attached.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 24th day of August, A. D. 1917.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. MCKEAN,
Clerk Supreme Court of Ohio.

Endorsed on cover: File No. 26,121. Ohio Supreme Court. Term No. 654. Albert Palmer et al., plaintiffs in error, vs. The State of Ohio. Filed August 30th, 1917. File No. 26,121.

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Authorities Cited.

- State vs. Warner, 65 S. W., 588.
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etc., R. R. Co., 121 N. W., 814.
Hickman vs. Kansas City, 41 Am. St. Rep., 684.
Rice vs. Howard, 69 Pac., 77.
Willis vs. Mahon, 48 Minn., 150, 50 N. W., 1110, 16 L.
R. A., 281.
State vs. Tooker, 25 L. R. A., 560.
State vs. Tuffley, 12 Pac., 835.
State vs. Sutton, 30 L. R. A., 630.
Swift vs. Newport News, 52 S. E., 821.
Knight vs. Miller, 87 N. E., 825.
People vs. O'Brien, 2 L. R. A., 255.
Erdman vs. Mitchell, 207 Pa. St., 79.
63 L. R. A., 534, and Virginia vs. W. Virginia through-
out.

Supreme Court of the United States

OCTOBER TERM 1918.

No. 654

ALBERT PALMER,

Plaintiff in Error.

vs.

THE STATE OF OHIO,

Defendant in Error.

ARGUMENT AND BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

The plaintiff in error begs to submit this his brief and argument on the motion to dismiss the above entitled action as to why the said action should not be dismissed.

The motion seems like a motion to dismiss a motion to dismiss. Because the case is in this court on a motion to quash the service and dismiss the action because of the claim that the service was improperly made.

The courts below have held that the service was properly made under the rules of the Supreme Court of the United States, as laid down in *Chisholm vs. Georgia*,

2nd Dal., 418, and the several cases in plaintiff's brief cited, namely, Grayson vs. Virginia, 3d Dal., 320; State vs. Warner, 65 S. W., 588.

The attorney general of the State of Ohio as the officer of the State of Ohio sets out that the state cannot be sued without her consent.

This has been admitted all the way through this case by the plaintiff.

The courts have held, and this is so set out in the record, that the State of Ohio **has** consented to suit. She has consented that suit might be brought against her, in the most solemn manner, namely, by vote of the people of the state, which is duly set out in the record of said entitled case on page 2 of the record thereof heretofore filed in this court.

The question sought to be settled is not, and has not been the fact of the consent, because the Court of Common Pleas, where the case originated, found as a matter of fact that "it must be conceded that the State of Ohio has consented that suit might be brought against her." This was affirmed without comment by the appellate court, and affirmed with comment by the Supreme Court of the State of Ohio.

This is set out in the record as aforesaid herein filed on August 30th, 1917.

This said record also contains the original petition filed in the Court of Common Pleas of Mercer county, Ohio, which sets out that it was the will, intention and understanding of the people adopting the constitution—a new constitution—on the third day of September, 1912—that when it was so adopted that it would authorize such a suit to be brought, and alleges this as a material fact, which plaintiff stands ready to prove.

The courts conceded that the people consented to suit against the state, but held that there was no machinery by which a judgment might be enforced.

Thence arose the self-executing proposition.

First, because the legislature had not designated in what courts such a suit was to be brought.

The argument sounds as when the leopard got out from his keeper, and he telegraphed to the manager that the leopard was out, and what shall I do. The manager telegraphed to shoot him on the spot.

In answer he got the message, "which spot."

The facts are that the constitutional convention was establishing the courts at the same time that they were submitting this amendment for adoption by the people, and the same people who adopted the said constitution, as amended, also named and provided the courts, the same courts that have been holding that the clause in question is not to be held self executing when it comes to protecting vested rights in the individual, hold that it is self executing when it comes to giving them the breath of life, and they each and every one of them derive their vitality from the adoption of this said constitution, by the people of Ohio, as citizens, and not as "subjects" as stated in defendant's brief on page 4.

If our courts were working under the feudal system of law, then the defendants would be correct in their contention, and we would have adopted the same system of law that now prevails in Germany.

It has been a hard matter for the courts to get out of the old feudal rut, and when they did get out, as in 2nd Dal., 418, they had the mill stone to the eleventh amendment to the federal constitution hung about their necks.

Then it is not true that it has **always** been the case, that the state could not be sued without her consent, because in that case the court points out that the state, the same as an individual, could be sued under the authority of both the common law and the constitution, and this court there further points out that this was the situation in many of the states for many years. The statement therefore is not true historically under the common law or the constitution as then adopted by the people of the United States. For this reason bare consent has been all that was necessary to take away the immunity from suit of the state.

So it is that the state may waive consent and thereby waive the immunity from suit.

Hollister vs. State, 9 Idaho 8, and Pac., 541.

The claim in this case was that neither the constitution of the state nor any statute showed that any consent had been given to suit; that the court held that a fair interpretation of the constitution and the statutes construed that the state had consented to suit.

Saranac Land and Timber Company vs. Roberts, 88 N. E., 753.

Right to sue the state involved.

"No action can be maintained against the state except by its express consent. Where the suit against a state officer is in reality against the state itself it cannot be maintained without its consent, but if the suit is against an officer or agent of the state based on his illegal acts, or to recover property illegally possessed by him the rule is otherwise. This action of itself passes the consent."

People on Relation of Bird as Attorney General vs. Detroit G. H. & M. R. R. Co. and People vs. Detroit, etc., R. P. Co., 121 N. W., 814.

These two cases involve the consent of the state to suit. The constitution there provided a limitation of time on charters, 50 years. The legislature passed several statutes about taxes on railroads in this state. These railroads enjoined the auditor and the attorney general. The court evolves this syllabus, or statement:

“The above statutes constitute a waiver of the right of the state not to be sued without its consent.”

“Immunity from suit waived by conduct after suit brought.”

State of Nebraska on Relation of Geo. H. Roberts vs. State of Nebraska, 4 Nebraska, 216.

There are numerous statutes in Ohio of waiver and permission to bring suit against the state in particular cases, before the amendment of September 3, 1912 and especially as to the very class of claims herein sued upon.

The findings of the courts in each instance have long since been satisfied.

If therefore officers and legislators, without the consent of the whole people, may waive immunity from suit, and consent that suit may be brought, why may not the people so amend their constitution as to so consent and when that consent has been passed, and the courts of the state have said “it must be conceded” that the people of the state have so consented, and when the attorney general of the state is here with a motion, trying to prevent a full hearing of the law and facts bearing upon the issues heretofore made, why is not the State of Ohio as such before this court as the plaintiff, Albert Palmer? There is no statement that he appears for this motion alone. Now if this far the state has waived may we not consider for a moment the sixth grievance

in the petition in error set out, "That the grievances complained of came through the impairment of a contract between the United States and the State of Ohio?"

The United States ceded the lands for the construction of the said reservoir for maintaining the Miami and Erie canal, which was to be kept open for the transporting commodities of the United States free of charge.

This use would have prevented the damages complained of. The State of Ohio has diverted this use to that of a public park, whence the waters are so held as to cause it to overflow and damage the crops of plaintiffs, as set out in their petition. The motions of the defendant seek to prevent the plaintiffs from obtaining any hearing whatever as to their rights under both the federal and state constitutions to have the right to enjoy their property.

We raise no question of the right of the people to repeal their consent.

The same power that creates a remedy may take it away. The cases therefore cited by the defendant have no application to the questions at issue.

That the court may have a clear conception of the questions we quote in full the opinion of Judge Bowman, whose decision in this matter has been affirmed by the courts of the State of Ohio. As we quote we will insert our contention as to what we contend has been decided to be and is the law.

"In the Court of Common Pleas of Mercer County, Ohio.

Albert Palmer, for Himself and Others, Plaintiff, vs.
The State of Ohio, Defendant. No. 9070.

Opinion.

Bowman, J.

This is a suit against the state on a claim for damages

on account of the waters of the canal system thereof negligently overflowing plaintiff's lands.

(It will be observed from reading the original petition on pages 13 and 14, that the state had entirely diverted the use of said lands from that of supplying the canal system, to that of housing the water for hydraulic purposes.)

"Service was obtained by issuing a summons directed to the sheriff of Franklin county, which was duly served upon the governor at Columbus, in said county.

The case is now submitted to the court on the motion of the attorney general to quash the service of said summons on the state for the reason that the issue and service of summons against the state is not authorized by law.

That a sovereign state cannot be sued in its own courts or in any other court without its consent is an established principle of jurisprudence. Not that there is no liability and no claim, but that there is no remedy; not because of freedom from liability, but lack of a tribunal to show and enforce the liability. *Coster vs. Mayor of Albany*, 43 N. Y., 408; *Ohio on Relation vs. Board of Public Works*, 36 O. S., 415.

It may however waive this privilege and permit itself to be sued by individuals. *Beers vs. Arkansas*, 20 How., 527, 529; *Hans vs. Louisiana*, 134 U. S., 15, 17; *North Carolina vs. Temple*, 134 U. S., 22.

It must be conceded that such consent was given by the amendment to Section 16 of Article 1 of the constitution adopted September 3, 1912, which provides that 'suits may be brought against the state in such courts and in such manner as may be provided by law.'

It is urged, however, that the legislature has not pro-

vided in what manner, nor in what courts, suits may be brought against the state, and until it does so, the suit cannot be maintained. In other words, that this amendment to the constitution is not self executing, but that legislation is necessary to give the same effect."

(It will be observed that the questions raised were, and are, entirely different from what the motion now filed with the court here would indicate, and are not of a frivolous character at all. If the attorney general can ignore the finding of fact that consent has been passed, and it could be said that no consent was given by the state that it might be sued in its own courts, then the motion might have some efficacy.

Further in this connection we wish to observe as to the conclusions reached by Judge Bowman, first, that he bases his reasoning and his conclusion upon wrong premises. The clause taken out of the constitution "Suits may be brought against the state in such courts and in such manner as may be provided by law," does not comprise the whole section as amended. If this clause stood alone and had no antecedent, it might be conceded that his reasoning and his conclusion might apply. Before September 3, 1912, the old constitution read: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation shall have remedy by due course of law, and justice administered without denial or delay."

While the amended constitution reads, as adopted on said September 3, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation shall have remedy by due course of law, and **shall have** justice administered without denial or

delay. Suits may be brought against the state in such courts and in such manner as may be provided by law."

Our contention is that this section as amended is to be read in the light of an amendment and all together.

Judge Bowman overlooked the fact, that at the time of the submission of this amended constitution by the constitutional convention they, the said convention, submitted to the same people for their adoption a different system of courts, with different powers and jurisdictions than those that had existed before that.

In other words, the same power that was adopting this amended constitution, was providing the courts in which the remedy sought might be had.

The people of the State of Ohio were at the same time providing by law, the kinds of courts that should always be open, and they emphasized the intention they had by adding "**shall have** justice administered," etc.

Certainly the "manner" would be controlled by the code, or practice, where such a constitution would be adopted.

Judge Bowman overlooked the further fact that this section is a remedial section entirely. It was true before the adoption of this amendment his language would have been correct. "Not that there is no liability and no claim, but that there is no remedy." So the contention of the defendant is not correct when he says on page 4 of his brief herein that in this case there never was a claim against the state. This decision of Judge Bowman was affirmed by both the Court of Appeals and the Supreme Court of the state.

Further commenting on the decisions, especially of that of the Supreme Court of Ohio. We observe that the constitutions quoted from, as precedent, for their

attitude, that the constitutions of California, Tennessee and Nebraska furnish such precedents sounds in travesty when we read the state may be sued, and the legislature shall provide by law, suits may be brought against the state in such manner and in such courts as may be directed by law, or "the constitutional provision that suits be brought against the state in such manner and in such courts as the legislature may by law direct is not self executing" are entirely different from the amended constitution of Ohio.

The situation in Ohio, at the time of the adoption of this amended constitution was that the people were providing the courts and the manner for bringing such suits, as they at the same time provided that the code should govern the procedure in these courts.

The people adopting this constitution at the same time adopted and provided a different system of courts, with different jurisdictions, and then open this section by saying all these courts shall be open and every person shall have justice administered in these courts that they were providing, and which courts in some divisions were from then to be known under a different name than that that had been the prior custom. There is no "direction." They were not contemplating any legislature, and, therefore, under the conditions they used no such word as shall be directed, but used the word as may be provided, and they were providing these courts and the law themselves. And that is what we allege in our petition was their intention which we say we stand ready to prove.

Second: Was the contention ended when the state court decided this proposition adversely?

In other words, was the decision of the highest court

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the state final? Had we a right to appeal to the higher court for the determination of this constitutional provision?

The several assignments of error are taken up by the defendant and the endeavor is made to show that the powers of this court are limited to only such contention involves the federal government.

Constitutions are written to protect the rights of the individual citizen. When they fail to do this they become a farce. The allegations of the petition show that the defendant, by its officers, engaged in an illegal and wanton and negligent proceeding took from the plaintiffs over \$24,000.

Prior to the amendment of the said constitution there was no remedy by suit. The people of the state amended their constitution so as to provide the remedy by suit. The courts of the state deny this. The same courts point out that the plaintiffs have no remedy. That is to say, that the officers of the state without due process of law may confiscate the property of the individual. Take the property and appropriate it to the public use without any compensation.

This would do under the feudal law, or in an autocratic form of government. That is not the spirit nor the scope of our constitution as amended. Not only so, but the federal government ceded the lands from which these complaints arose, by reason of the fact that the officers of the trustee state so changed the use to which these lands were to be put, namely that of maintaining a canal on which federal commodities could be transported without charge, to a mere reservoir in which the waters were so kept and housed, and not so used as the federal government had contemplated, as that by

reason thereof the said officers of said state were able and did so take over the complainant's property, for which the state refuses to pay. Prior to the said amendment, when they had so flooded these lands, the legislature from time to time passed statutes of consent empowering the individual to bring suit. This was done in several instances, and the individuals were compensated. No such act has been passed since the amendment to the constitution. Hence it is not true that the interpretation of this constitution by the state courts does not conflict with the federal constitution, or the state constitution for that matter, when it furnishes the means by which the individual's property may be illegally confiscated and therein announce that the individual has no remedy it becomes a "**subject**" under a government by force.

Under such a system the lord of the manor took over all the property of his tenant. So we maintain that none of the cases cited by the defendant meet the situation, and the case of *Baltzer vs. North Carolina* does not apply, 161 U. S., because the consent of the state to suit in Ohio has never been withdrawn, and can only be withdrawn in the same manner in which it was given, namely by the vote of the people of the state.)

Further quoting the opinion of Judge Bowman:

"While prohibitory provisions in a constitution are usually self executing to the extent that anything done in violation of them is void, affirmatively self executing provisions may be found in every modern constitution, and require no legislation to put them into operation, but as said by Mitchell, J., in *Willis vs. Mahon*, 48 Minn., 140, speaking for the court at page 150:

"The question in every case is whether the language of the constitutional provision is addressed

to the courts or the legislature—does it indicate that it was intended as a present enactment complete in itself as definite legislation, or does it contemplate subsequent legislation to carry it into effect?"

(Judge Bowman stops short of quoting fully from the case of *Willis vs. Mahon*, wherein the fourth syllabus reads:

"Every statute made against an injury, mischief or grievance impliedly gives a remedy for it; if no remedy is especially given the party has an action on the statute. It is made self executing."

State on relation of *Harris*, 144 Pac., 109, citing *Willis vs. Mahon*, 31 Am. St. Rep., 623,

in which this language is used by the court:

"Much stress is laid upon the fact that this provision contains no remedy for enforcement of the liability as indicating that it is not intended to be self executing. We fail to perceive any force whatever in this line of argument. As was said by Lord Holt, 'If a man has a right he must have a means to vindicate and maintain it, and indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.'"

What we insist on is that all parts of the same case or the same section of a law, a statute or a constitution, should be read all together, so as to get the true intent of the whole.

The case of *Willis vs. Mahon* is an authority for maintaining the self executing force of the section under consideration when taken in its entirety.)

Still quoting the full text of Judge Bowman's decision:

"In *Harris vs State*, 74th Oregon, 582, Ramsey, Judge, says:

"Constitutional provisions are self executing

where it is the manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of the right given, or the enforcement of a duty or liability imposed.'

Cooley on Constitutional Limitations (7th Ed.), 121, says:

'A constitutional provision may be said to be self executing if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed enforced, and it is not self executing when it merely enacts principles, without laying down rules by means of which these principles may be given the force of law.'

In *Davis vs. Burke*, 179 U. S., 399, Justice Brown, speaking for the court in page 403, says:

'When a constitutional provision is complete in itself, it needs no further legislation to put it in force. When it lays down certain general principles as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words it is self executing only so far as it is susceptible of execution.'

Conceding that this amendment should be so construed as to give effect to the intention of the framers and the electors who adopted it, and that they should be taken to have intended what the language used means, the language employed in the amendment indicates that the subject with which it deals is to be referred to the legislation for action."

(We deny this. The courts below forgot the true situation. The framers of the amendment in question, and the constitution as a whole was submitted to the people

who could either adopt or reject. The former proposed constitution had been rejected.)

“While the judicial power of the state is vested in a supreme court, court of appeals, courts of common pleas, and courts of probate, and such other courts inferior to the court of appeals as from time to time may be established by law, the amendment does not provide that courts at present established shall have jurisdiction to entertain suits against the state, or if so, which thereof, but such only as may be provided by law. If in such courts only as may be provided by law, it is made the duty of the legislature to establish courts to entertain such suits, or to confer at least such jurisdiction upon some one or more of the courts now established.”

(Verily! Which spot! Before the adoption of this amended constitution, we had no court of appeals in Ohio, and no common pleas court, or supreme court organized as these courts now are. These were all established in the law of the constitution then adopted, and this was the occasion for using the language used in said Section 16, and under the circumstances, no other language would have been appropriate, and the legislature is only given authority to establish inferior courts.)

“While the right is given to sue the state, the courts in which such suit may be brought, the means by which it may be enforced and protected is not determined nor provided.

So, too, existing provisions of the code of civil procedure as to the manner of suits shall not apply and govern unless so provided by law, but it is made the duty of the legislature to so provide or adopt other, and it may be a more summary and expeditious manner of instituting and conducting suits against the state. It is not

left to the plaintiff to select the court in which to sue the state, but it ~~is~~ made the duty of the legislature to designate or establish courts in which suits may be brought, and the manner thereof, and until this is done, the right to sue the state does not.

The amendment is not, therefore, self executing and complete in itself, but permissive only and dependent on the action of the legislature to put it into operation. Not only does it not execute itself, but it does not furnish the courts with any means of executing it.

It is a mandate to the legislature and does not become effective until legislative action. In other words, it contemplates subsequent legislation in its aid to make it operative and to give it effect, and until this is done it is not in the power of the court to give it effect.

It is apparent that the amendment was addressed to the legislature and not to the courts."

(This is in direct conflict with the language of the section when it starts out with "all courts shall be open," etc., and nowhere is there any suggestion that the legislature is to be appealed to, and our main brief will show that the whole intent of this amendment, when proposed, was to take it out of the power of the legislature.)

"These provisions of the amendment as to what courts and the manner in which suits may be brought against the state cannot be cast aside as so much 'dead wood.' We must presume that the framers and the people who adopted said amendment must have inserted these provisions with a clear vision of a fixed purpose which we cannot disregard.

They could have selected the courts and provided the manner of the suits, but they stopped short and left to

the legislature the duty of providing therefor by law.”

(The only law by which Judge Bowman was given the power to say these things was the adoption of the amendment to this same constitution on the very same day when the amendment under consideration was brought into being. Then Judge Bowman’s conclusions are in direct conflict with all precedent upon this proposition, because where legislatures are requested by the people to pass prohibitive legislation, or where by their inaction, or unfriendliness they can impose upon and take away the enjoyment of private property by such inaction, all courts hold that the objects of the provision become self active, and the courts find the remedy. All this is conceded, and yet the particular spot is to be delineated.

See—

Hickman vs. Kansas City, 41 Am. St. Rep., 684,
and Virginia vs. West Virginia.

Rice vs. Howard, 69 Pac., 77.

Willis vs. Mahon, 48 Minn., 150, 50 N. W., 1110,
16 L. R. A., 281 and 31 Am. St. Rep., 626.

On page 632 the court in the Willis vs. Mahon of this last report say, “**Ubi jus ibi remedium**” is as old as the law itself.

We have quoted from nearly 50 cases directly on this subject in our main brief and they all hold adversely to the decision announced here. The 69 Pac. lays down the historical statement that the courts have changed in the last 50 years, because it has been discovered that legislatures, as in the case at bar, together with the officers of the state, are prone to prejudice against claims against the state and for political reasons are generally unfriendly, and for this reason evade and nullify constitutional provisions.

"Accordingly the presumption now is that all provisions of the constitution are self-executing."

Rice vs. Howard, 69 Pac., 77.

State vs. Tooker, 25 L. R. A., 560.

State vs. Tuffley, 12 Pac., 835.

State vs. Sutton, 30 L. R. A., 630.

Swift vs. Newport News, 52 S. E., 821.

"So it is held that a constitution declarative of a common law right should be held self-executing."

And further, "It is generally recognized that legislation is unnecessary to enable the courts to give effect to constitutional provisions guaranteeing the fundamental rights of life, liberty and the protection of property."

Knight vs. Miller, 87 N. E., 823.

People vs. O'Brien, 2 L. R. A., 255.

Erdman vs. Mitchell, 207 Pa. St., 79.

63 L. R. A., 534.

(If these principles are correct, and Judge Bowman has decided that the claim existed, a common law right which would have been enforceable against the individual, then by his conclusion, and which has been affirmed by the court of appeals and the supreme court of the state, and in the same decision has shown, which will appear just a little further along in his decision, that no other right exists since the adoption of this amended constitution, for recovering for the appropriation and confiscation of property by the state, than this provided suit against the state, then why have not these plaintiffs lost by such denial? Therefore, all the citations to show that the plaintiffs have lost nothing by such inconsistent conclusions fall to the ground. For if right and remedy are reciprocal, as stated by that most eminent jurist,

Judge Holt, and before the constitution was amended, the remedy was held not to exist, and by the amended constitution a remedy is afforded, or intended to be afforded, and the courts hold that the legislature may defeat this remedy by inaction, then what have the people gained by the adoption of this constitution. In other words, the courts take away the common right of the individual to enjoy his property under the federal constitution.)

Further quoting the said decision:

"If to make the amendment dependent on the action of the legislature is to make it subject to be defeated by the inaction of an unfriendly legislature, it was within the power of the people had they so desired to have so framed it as to require no legislation to put it into operation, but failing to do so it is not for the courts to give it effect without such legislation, and such failure would be a wrong for which there is no judicial remedy."

The Chicago, etc., R. R. Co. vs. State, 53 Wis., 513.

(We cannot see any wrong in requesting the state to pay for the property the state takes from its citizens. This proposition sounds farcical. Smacks of evasion and excuse. Besides the constitution on which this Wisconsin case is based is not, as we have before stated, in relation to Judge Jones' decision in the supreme court such a constitution as this amended sixteenth section. There is a vast difference between our amended Section 16 in its reading and the said Wisconsin case, where the constitution reads in the same manner as those constitutions relied on by Judge Jones, namely, "suits may be

brought against the state in such manner, and in such courts as shall be directed by the law."

As we have said, when our amendment was being proposed, no other language would have fitted the situation, and the people were instructed through the president of the constitutional convention, that in case this amendment was adopted, the claims against the state would thereafter be tried in the courts and **not in the legislature as theretofore.**)

"That a constitutional amendment providing that 'suits may be brought against the state in such manner, and in such courts, as shall be directed by law' confers a right simply to prosecute a claim against the state, but that no such suit may be brought thereon until the legislature has established courts for that purpose, or authorized those established to entertain jurisdiction, and likewise providing for the manner of such suits, see *Galbes vs. Girard*, 46 Federal, 500; *Beers vs. State*, 20 How. (U. S.), 527; *Oil Co. vs. Crane*, 117 Tenn., 82; *State vs. Hortensen*, 69 Neb., 385, 386; *Chicago, etc., R. R. Co. vs. The State*, 53 Wis., 509, 513; *Dickson vs. State*, 1 Wis., 110; *Northwestern, etc., Bank vs. The State*, 18 Wash., 73; *Tate vs. Salmon*, 79 Ky., 543; *Commonwealth vs. Haly*, 106 Ky., 716.

It is confidently asserted, however, by counsel for the plaintiffs, under authority of *Chisholm vs. Georgia*, 2 Dallas, 419, that until the legislature provides differently, existing laws should control as to courts having jurisdiction of such suits, and the manner thereof, and that service of process on the governor and attorney general is sufficient service on the state.

The question, however, before the courts in that case was not whether the state courts have power to entertain

suits by individuals against the state without its consent, but whether a state may be sued in the federal courts by its own citizens, and as said by Bradley, J., in *Hans vs. Louisiana*, 134 U. S., 11, the decision created such a shock throughout the country, that at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and in due course adopted by the legislature of the state, and that 'this amendment expresses the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court.'

(This statement is not strictly true. The eleventh amendment was only a limitation upon the courts as to one particular, of which the court here has full cognizance, but in view of the fact that the original reasoning in that case can never be refuted, the mere consent of the state to suit re-establishes the right therein decided as the fundamental right of the citizen, and particularly is this true when we look into the history of the hardships brought upon many a citizen by the refusal, under this amendment, to recognize the rights of the citizen, and which was fully discussed in the constitutional convention proposing this amendment to the people of Ohio for the very purpose of curing the evils, and suppressing the mischief that arose by the means of this eleventh amendment. An examination of the proceedings of the constitutional convention, pages 1431, 4132, where they say, "Why should the humble claimant against the state be obliged to abjectly supplicate the legislature for the privilege of entering the court of justice?" and where Judge Norris has read to the convention Sections 1677, 1678 of Judge Storey's Federal

and Constitutional Law, to show what an injustice was being done by the state claiming its immunity from suit. The sections are long, but they bear out the argument that we are here adopting.

The whole showing that this case is not frivolous, but is a question of human rights and one that was a very serious question before that convention, and one which the people understood as giving them the right to immediate relief upon the adoption of the amended section, Section 15 of Article 1 of Ohio.)

Again,

“Claim is made by counsel for the state that Sections 455 to 464, inclusive, of the act approved March 19, 1915, (105 O. L., 125), were enacted in obedience to said amendment to the constitution and to make it operative and effective, and that specific provision is made therein for determining claims for damages to private property on account of overflowing their property by the waters from the canal system of the state, and that such provision is by its terms exclusive.

The provision is for the superintendent of public works to appoint three commissioners to consider such claims with power to examine property injured, hear testimony and

‘If they are of the opinion that the injury resulted from the defective construction of any part of the public works, which might have been avoided by the use of ordinary skill or care, or resulted from the want of proper care on the part of the officers or agents of the state in maintaining or repairing the construction of any part of the public works and that the accident was unavoidable by the use of ordinary care on the part of the applicant, they shall award him such damages as they deem just.’

The award shall be submitted to the general assembly and payment be made from monies exclusively appropriated for that purpose.

Is this a remedy by suit against the state within the meaning of this amendment to the constitution? If so, it is exclusive, otherwise not.

The amendment contemplates a suit in court. In legal phrase, a suit is the prosecution of some claim, demand or request in a court of justice. *Callion vs. Ellison*, 15 O. S., 453; *Railroad vs. Larwill*, 83 O. S., 116; *Weston vs. City Council of Charleston*, 2 Peters (U. S.), 464.

Now a court of justice is a tribunal empowered to hear and determine questions of law and fact, either with or without a jury, upon pleadings, either oral or written, and upon evidence to be adduced under well defined and established rules according to settled principles of law.

Applying this principle to the claim that the remedy provided by said act is exclusive, it does not seem difficult to come to the conclusion that the amendment to the constitution contemplated a suit in courts which shall be open and in which every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and justice administered without denial or delay as guaranteed by Section 16 of Article 1 of the constitution, and of which it became a part upon its adoption.

The commission to be appointed by the superintendent of public works is neither a court within the meaning of the constitution, nor is the prosecution of a claim before such commission in the nature of a suit in a court of justice.

This act, therefore, did not make operative said

amendment to the constitution nor carry it into effect, and while it may be the only remedy now open to the plaintiffs, it is not exclusive in the sense that it is the remedy secured by said constitutional amendment."

(And we submit that the whole tenor of this decision is in conflict with the federal constitution when taken with this Section 16 amendment to the Ohio constitution and with Article 3, Section 2 of the federal constitution, which provides for suits between the states and a citizen thereof, and with that provision in both constitutions of Ohio and the United States providing against the invasion of private property without compensation.)

We have quoted in full from Judge Bowman's opinion, because of the fact that it was affirmed in toto, and adopted by the court of appeals and the supreme court of the State of Ohio as their opinion.

It shows:

First. That the questions raised are not frivolous.

Second. That the denial of relief under the amended Section 16 of Article 1 of our Ohio constitution lays open the most insidious channel for confiscating the citizen's property, and thereby invades his property rights under both the state and federal constitutions; notwithstanding their language of guaranty against such taking.

Third. It shows that the superintendent of public works can so confiscate property when acting in an illegal manner, and without authority of law, and then if the remedy suggested is the only remedy, when he appoints a commission to uphold himself in his illegal performances, he so prevents the claimant from having any

hearing as to his constitutional rights, thereby depriving the citizen of the state of his property.

Such is the effect of these decisions. The people of Ohio never had any such intention when they adopted said amendment.

We insist, therefore, that the motion should be overruled, and that the plaintiffs be permitted to file their briefs upon the original question raised in the courts below on both the federal and state constitutions, and for a hearing upon the usual oral arguments thereon.

Respectfully submitted,

I. F. RAUDABAUGH and

JOHN G. ROMER,

Attorneys for the Plaintiffs.

Supreme Court of the United States

OCTOBER TERM 1918.

No. 260

ALBERT PALMER ET AL.,
Plaintiffs in Error,

vs.

THE STATE OF OHIO,
Defendant in Error.

Error to the Supreme Court of Ohio.

**MOTION TO AFFIRM AND BRIEF IN SUPPORT
THEREOF.**

MOTION.

The defendant in error, the State of Ohio, moves that the judgment of the Supreme Court of the State of Ohio in this cause be affirmed on the ground that it is manifest that the questions on which the decision of this cause depend are so frivolous as not to need further argument.

JOSEPH MCGHEE,

Attorney General of Ohio;

FRANK DAVIS, JR.,

Attorneys for Defendant in Error.

BRIEF IN SUPPORT OF MOTION.

STATEMENT.

The action sought to be reviewed originated in the Court of Common Pleas of Mercer county, Ohio, by a petition filed by Albert Palmer, the present plaintiff in error, on behalf of himself and others, who are not named, against the State of Ohio. The action was for damages on account of alleged negligence of the State of Ohio through its Board of Public Works in so constructing a certain reservoir, known as the Mercer County Reservoir, as to cause the lands of plaintiff and others to be flooded.

The attempt to begin the action was by a summons issued by the clerk of the Common Pleas Court of Mercer county, in February, 1915, and served by the sheriff of Franklin county, upon the governor of Ohio, on February 9, 1915. The summons was endorsed "Suit against the State, damages claimed, \$24,953.00."

After this attempted service of summons a motion was filed on behalf of the state, by the attorney general, objecting to the jurisdiction of the court and asking that the service and return be set aside and held for naught for the reason that the issuance and service of summons and process against the State of Ohio was not authorized by law. This motion was sustained by the Common Pleas Court, the service quashed and petition dismissed. In error proceedings the action of the Common Pleas Court was affirmed by the Court of Appeals and by the Supreme Court of Ohio in the proceedings which this court is now asked to review,

Section 16, Article I of the Ohio Constitution prior to the amendment thereof provided:

“Sec. 16. All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay.”

By amendment adopted September 3, 1912, which became effective January 1, 1913, this section was changed so that it now provides:

“Section 16. All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and **shall have** justice administered without denial or delay. **Suits may be brought against the state, in such courts and in such manner, as may be provided by law.**”

Since said amendment no law has been passed in pursuance of this constitutional authority, and the statute laws of Ohio on the subject of suits against the state are just the same as they were prior to the amendment, viz., entirely silent.

ARGUMENT.

The state courts held that the constitutional amendment providing that "suits may be brought against the state, in such courts and in such manner, as may be provided by law" is not self-executing, and hence that statutory authority is necessary before the state can be sued in its own courts. It having always been the law in Ohio that the state is not subject to suit in its own courts without its express consent, the situation in regard to such suits, until legislation is enacted as to the courts in which such suits may be brought and the procedure by which they should be governed, is just the same as it was prior to the amendment. The decision of the highest court of Ohio upon this question is final as it is wholly a state question, nothing has been taken away from the plaintiff which was granted by the Federal Constitution, and no right of his under that instrument has been interfered with. His claim at most is that the Supreme Court of Ohio has held that the legislature of the state has not provided the machinery necessary for him to assert a claim which the amendment to the constitution of Ohio allows him to assert. It being plain that such legislation is necessary and being admitted that no such legislation exists, there is no remedy which any court could give him. The opinion of Judge Jones, of the Ohio Supreme Court, concurred in by all the judges (Record, page 19) is conclusive as to the merits of the case.

We submit that no federal question of any real substance or merit exists at all in this case; and that the contentions relied upon to raise such questions have long

since been otherwise decided. The assignments of error relied upon by plaintiff in error appear on page two of the record.

The first assignment simply states generally, that the decision in the state court was contrary to law.

The second assignment alleges a violation of the Fourteenth Amendment to the United States Constitution. The only provision in the clause quoted which could possibly have any application to the instant case is "nor shall any state deprive any person of * * * property, without due process of law." The only deprivation that can be imagined in this case is the one which results from the fact that a state cannot be sued without its consent, but this is and always has been the law.

United States vs. Lee, 106 U. S., 196, at 207, holds that this question is no longer open to argument, and cites:

United States vs. Clarke, 8 Peters, 436.

United States vs. McLemore, 4 Howard, 286.

Hill vs. United States, 9 Howard, 286.

Nation vs. Johnson, 24 Howard, 195.

The Siren, 7 Wall, 152.

The Davis, 10 Wall, 15.

It can hardly be said that a state is depriving one of property without due process by insisting upon that which is and always has been the right of any sovereignty, namely, to be immune from suit at the hands of its subjects, without its consent.

It has been repeatedly decided by this court that the refusal on the part of a state to consent to suit does not deprive the claimant of any right guaranteed him by the United States Constitution. Most of the adjudicated cases involve the question of whether a state can **repeal** an act consenting to suit, without violating constitutional rights of claimants whose claims arose before the

repeal. The cases all hold that such a consenting provision may be repealed without violating constitutional rights.

Railroad Company vs. Tennessee, 101 U. S., 337.

Railroad Company vs. Alabama, 101 U. S., 832.

Beers vs. Arkansas, 20 Howard, 527.

Hands vs. Louisiana, 134 U. S., at 18.

Baltzer vs. North Carolina, 161 U. S., at 245.

The cases cited present the question in a light much more favorable to one who has a claim against the state, than this case, because, in the cases cited, the state legislature removed a right which once existed, while in this case, there never was a right against the state, so that here only the refusal to consent can be complained of. But we have already shown that such refusal violates no constitutional right of the plaintiff in error.

The third assignment, that the judgment violates Article 5 of the United States Constitution, is not well founded, for it is settled that Article 5 is an inhibition upon the powers of the Federal Government and not upon the separate states.

Barron vs. Mayor, etc., of Baltimore, 7 Peters, 243.

The opinion of Marshall, C. J., concludes as follows:

“If these purposes be collected, the 5th Amendment must be understood as restraining the power of the general government not as applicable to the states.”

This decision is affirmed in

Spies vs. Illinois, 123 U. S., 131.

Brown vs. New Jersey, 175 U. S., 172,

which latter case collects and cites many other cases.

The fourth and fifth assignments complain that the

Supreme Court of Ohio was in error in holding that amended Section 16 of Article 1 of the Ohio constitution is not self-executing and hence does not, without further legislative action, make the state liable to suit; but there is no Federal question involved in this point, it is a decision of a state court interpreting the state constitution; the interpretation which the state court has put upon it does not make it conflict with the Federal Constitution, for it must be admitted that the law **could be** as the state court has said it is, without conflicting with the United States Constitution. This must be true, for in most of the states of the Union there is no consent to suit. If the state law **could be** so, and be valid, then the decision by the highest court of the state, that the law **is so**, must settle the point as to what the state law is. In the case of **Baltzer vs. North Carolina**, 161 U. S., 240, it was complained that the state court was in error in holding that a subsequent constitutional provision had repealed a former provision allowing suits against the state. The court said, at page 245:

"Indeed, it was frankly conceded that the exercise by the State of the power to repeal a grant of authority to its courts to audit claims against itself, would not in any manner violate the obligations of contracts which had been entered into by the State at a time when the power existed. Yet, whilst this concession was made, it was asserted that the impairment of the obligation of the contract, here claimed to have been accomplished, arises from the fact that the state court erroneously held that the amendment to the state constitution repealed the court's authority to examine and recommend the claim presented to it, when in fact such repeal had not taken place. In other words, it was argued that although the right to have the claim examined and recommended was existing and unrepealed, the state court had impaired the obligations of the contract by holding that such right was non-existing because

repealed by a subsequent provision of the state constitution. But this is mere reasoning in a vicious circle, for the concession that the right could be taken away without violating the contract clause of the Constitution, necessarily implied that the decision of the state court as to repeal vel non in no way involved rights protected from impairment under the Constitution of the United States. It is apparent that no rights under the Constitution of the United States arose in favor of the claimant from the provision conferring on the courts of the State the authority to examine and recommend, since all the benefits resulting therefrom could admittedly be withdrawn without violating the contract. To give effect to the contention of the plaintiff in error, we should be obliged to announce the contradictory proposition that where there were no rights under the Constitution of the United States to be impaired, yet a decision of the state court had impaired such rights. We should also be obliged to hold that although the state could at its will take away the right without impairing the contract, yet a decision by the court of last resort, of the State, that the right had been taken away was an impairment of the contract. The fallacy contained in the argument results from overlooking the fact that the moment it is submitted that the repeal of the right to have the claim examined and recommended is no impairment of the obligation of the contract secured under the Constitution of the United States the question whether or not such right has been repealed becomes purely a question of state law to be determined by the state courts."

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The sixth assignment that "the grievance complained of came about through the impairment of a contract between the United States and the State of Ohio" has no legal significance so far as we can discover.

Respectfully submitted,

JOSEPH MCGHEE,
Attorney General of Ohio.

FRANK DAVIS, JR.
Attorneys for Defendant in Error.

